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January 23, 1980

TO: The Deputy Secretary
FROM: L. - Roberts B. Owen

U.S. Obligations Under the 1959
U.S.-Pakistan Agreement of Cooperation

Attached is a memorandum of law on the above subject, designed to emphasize the significance of the obligations imposed upon the United States by the 1959 Agreement while, at the same time, assuring the Congress that the Agreement does not intrude upon Legislative Branch prerogatives.

We have not included in the attached memorandum a discussion of the extreme sensitivity in the Congress, and especially the Senate, on the subject of U.S. security commitments, or the history of the Department's efforts over the years to distinguish the 1959 Agreement from our commitments under the various mutual security treaties. However, the following information may be useful to you in this regard.

The 1959 Agreement, and two bilateral agreements concluded on the same date with Turkey and Iran, were conceived of as an alternative to U.S. membership in the Baghdad Pact (later redesignated as CENTO). The Executive Branch has not regarded these agreements as involving any new or increased commitments by the United States, and Assistant Secretary Macomber so advised Senator Mansfield by letter on February 28, 1959. We have carefully distinguished U.S. obligations under these agreements as being "basically an obligation to consult on possible U.S. or joint action" as opposed to the "legally binding commitment to take appropriate

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action" under our various mutual defense treaties (NATO, SEATO, Rio Pact, ANZUS, Japan, the Philippines, and Korea).

Congressional concern over U.S. security commitments grew substantially during the period of the Vietnam conflict. This concern was reflected in the National Commitments Resolution of June 25, 1969 (Sen. Res. 85, 91st Cong.), expressing the sense of the Senate that any U.S. security commitment "results only from affirmative action taken by the executive and legislative branches ... by means of a treaty, statute, or concurrent resolution ... specifically providing for such a commitment." This concern was reflected as well in extensive SPRC hearings on U.S. commitments to foreign powers, in attempts to repeal the Tonkin Gulf and other area resolutions, in the Spanish bases controversy, and in the adoption of Section 8 of the War Powers Resolution, which expressly denied that Congressional authorization for the introduction of U.S. forces into hostilities could be inferred in the absence of legislation specifically authorizing such introduction.

The Executive Branch has been careful not to assert the authority to incur "security commitments" by executive action, either on the basis of the President's Constitutional authority or on the authority of previous Congressional area resolutions. The Executive Branch has acknowledged in testimony before the Senate that "agreements which involve a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should be cast in the form of a treaty in the constitutional sense." In commenting on proposals to repeal the various area resolutions, the Department neither advocated nor opposed such action, and stated that "the administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans."

Drafted by:

L/PN:MJMatheson:L:JMichel:rr

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Attachment:

Memorandum of Law

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MEMORANDUM OF LAW

SUBJECT: U.S. Obligations Under the 1959
U.S.-Pakistan Agreement of Cooperation

This memorandum considers the status and character of U.S. obligations under the 1959 U.S.-Pakistan Agreement of Cooperation 1/ with respect both to international law and U.S. law.

1. Background

In March 1957, responding to a general increase of tension, conflict and Soviet influence in the Middle East area, the Congress adopted the Joint Resolution to Promote Peace and Stability in the Middle East. 2/ That Resolution provided, in part, that:

...the President...is authorized to cooperate with and assist any nation or group of nations in the general area of the Middle East desiring such assistance in the development of economic strength dedicated to the maintenance of national independence.

...The President is authorized to undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance.

1/ Signed in Ankara and entered into force March 5, 1959; 10 UST 317, TIAS 4190.

2/ Public Law 85-7, 71 Stat. 5; amended by the Foreign Assistance Act of 1961, 22 USC 1961-65.

Commitment provided that such action be consonant with the treaty obligations of the United States and with the Constitution of the United States.

As one means of responding to these concerns, the United States concluded bilateral agreements of cooperation with Turkey, 3/ Iran, 4/ and Pakistan, 5/ three members of the Baghdad Pact, 6/ laying down a similar framework in each case for common efforts to deal with the possibility of external aggression.

3/ Signed in Ankara and entered into force March 5, 1959; 10 UST 320, TIAS 4191.

4/ Signed in Ankara and entered into force March 5, 1959; 10 UST 314, TIAS 4189.

5/ See note 1 above.

6/ The Pact of Mutual Cooperation (commonly known as the "Baghdad Pact") was signed in 1955 by Iraq and Turkey, and adhered to by the UK, Pakistan and Iran later in 1955. On March 24, 1959 Iraq withdrew from the Pact, and it was redesignated as the "Central Treaty Organization" (CENTO) later in the year. See S. Whitman, Digest of International Law 1029-1101.

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The Preamble to the U.S. - Pakistan Agreement states that:

...the Government of the United States of America regards as vital to its national interest and to world peace the preservation of the independence and integrity of Pakistan....

To give effect to this vital interest, Article I provides, in part, as follows:

...In case of aggression against Pakistan, the Government of the United States of America, in accordance with the Constitution of the United States of America, will take such appropriate action, including the use of armed forces, as may be mutually agreed upon and as is envisaged in the Joint Resolution to Promote Peace and Stability in the Middle East, in order to assist the Government of Pakistan at its request.

1. U.S. International Obligations

Under Article I of the 1959 Agreement, in the event of aggression against Pakistan, the United States is obliged (in accordance with its constitutional processes) to take "such appropriate action...as may be mutually agreed upon...." One possibility envisaged by the Parties at the time of the Agreement was the use of armed forces in response to aggression by a country "controlled by international communism"; other possible responses might include the provision of security assistance, a call for U.N. action to restore international peace and security, or a resort to collective measures in concert with like-minded States. The United States is obliged, in such circumstances, to consult with Pakistan and to consider these or other appropriate courses of action to deal with the aggression in question.

In addition, Article II of the 1959 Agreement provides, in part, that:

The Government of the United States of America, in accordance with the Mutual Security Act of 1954, as amended, and related laws of the United States of America...reaffirms

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that it will continue to furnish the Government of Pakistan such military and economic assistance as may be mutually agreed upon between the Government of the United States of America and the Government of Pakistan, in order to assist the Government of Pakistan in the preservation of its national independence and integrity and in the effective promotion of its economic development.

This Article states a U.S. intention (in accordance with its relevant legislation) to provide the military and economic assistance necessary to preserve the national independence of Pakistan, and gives rise to a U.S. obligation to consult with Pakistan in this regard and to provide such assistance (in accordance with relevant U.S. legislation) as the two Governments may agree upon.

The obligations contained in these Articles do not constitute security commitments of the type incorporated in such collective defense treaties as the North Atlantic Treaty, 7/

7/ Signed in Washington April 4, 1949, and entered into force August 29, 1949; 4 Bevans 828, TIAS 1964. Compare Article 5, which provides in part that:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them...will assist the Party or Parties so attacked by taking forthwith...such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area...

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the ANZUS Treaty 8/, and the U.S.-Japan Mutual Security Treaty, 9/ in that the United States is not specifically obliged under the 1959 Agreement to take action except as may be mutually agreed upon. 10/ Nonetheless, our obligations under the 1959 Agreement do constitute an

- 8/ Security Treaty Between Australia, New Zealand, and the United States of America; signed in San Francisco September 1, 1951, and entered into force April 29, 1952; 3 UST 3420, TIAS 2493. Compare Article IV, which provides in part that:

Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes....

- 2/ Treaty of Mutual Cooperation and Security Between the United States of America and Japan; signed in Washington January 19, 1960, and entered into force June 23, 1960; 11 UST 1632, TIAS 4509. Compare Article V, which provides in part that:

Our Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety, and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

- 10/ A comprehensive summary of U.S. defense commitments and assurances was provided by the Department of State to the Senate Foreign Relations Committee on August 17, 1967. Hearings on U.S. Commitments to Foreign Powers, Before the Senate Committee on Foreign Relations; 90th Cong., 1st Sess.; P. 52-69.

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important, legally binding commitment of the United States to Pakistani independence and territorial integrity, and an assurance of prompt U.S. consultation with a view to appropriate joint action to repel aggression.

3. U.S. Law

Because of the character of the obligations assumed under the 1959 Agreement, it was within the President's Constitutional authority to conclude it as an executive agreement, rather than in the form of a treaty.

Under Articles I and II, an obligation to take action in response to aggression is contingent on further U.S. agreement, and on U.S. Constitutional processes. To the extent that any desired course of action might require Congressional authorization, the President would have to seek such Congressional authorization before taking or agreeing to take such a course of action, or would have to make his agreement subject to Congressional approval. For example, the President could, without further Congressional action, request the U.N. Security Council to take measures under the U.N. Charter to repel aggression against Pakistan; but he could not agree to provide security assistance to Pakistan for the same purpose except within the limits of applicable legislative authority and available appropriations.

In concluding the 1959 Agreement, the President acted in the context of the 1957 Joint Resolution to Promote Peace and Stability in the Middle East, 11/ which expressed the strong support of the Congress for measures of the type represented by the Agreement. Nonetheless, the Executive Branch has stated that it does not rely on this Resolution as an independent grant of statutory authority for involvement of the United States in a conflict in that area, and that the repeal of the

11/ See note 2 above. The language of the Resolution deliberately avoided the question of the extent to which the President might use U.S. armed forces in the area without further Congressional action. See Background Information Relating to Peace and Security in Southeast Asia and Other Areas; Senate Foreign Relations Committee Print; 91st Cong., 2nd Sess.; p. 51.

Resolution would not affect the continuing validity of
the 1959 Agreement. 12/

Thus neither the Agreement nor the Resolution
enlarge or diminish the President's authority under
U.S. law with respect to possible actions to repel
aggression against Pakistan, and U.S. obligations under
the Agreement in no way transgress the limits of the
authority of either the President or the Congress under
U.S. law.

Roberts B. Owen

12/ Senate Rep. No. 91-834; 91st Cong., 2d Sess.;
P. 34-35.

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